

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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SHAWNDELL BRYANT,

Petitioner,

v.

DWIGHT NEVEN, et al.,

Respondents.

Case No. 2:12-cv-00348-MMD-GWF

ORDER

Before the Court are the petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (dkt. no. 5), respondents' motion to dismiss (dkt. no. 13), petitioner's opposition (dkt. no. 17), and respondents' reply. The Court finds that petitioner has not exhausted his available state-court remedies for part of one ground, and the Court grants the motion in part.

Before a federal court may consider a petition for a writ of habeas corpus, the petitioner must exhaust the remedies available in state court. 28 U.S.C. § 2254(b). To exhaust a ground for relief, a petitioner must fairly present that ground to the state's highest court, describing the operative facts and legal theory, and give that court the opportunity to address and resolve the ground. *See Duncan v. Henry*, 513 U.S. 364, 365 (1995) (*per curiam*); *Anderson v. Harless*, 459 U.S. 4, 6 (1982).

1            “[A] petitioner for habeas corpus relief under 28 U.S.C. § 2254 exhausts available  
 2 state remedies only if he characterized the claims he raised in state proceedings  
 3 *specifically* as federal claims. In short, the petitioner must have either referenced  
 4 specific provisions of the federal constitution or statutes or cited to federal case law.”  
 5 *Lyons v. Crawford*, 232 F.3d 666, 670 (9th Cir. 2000) (emphasis in original), *amended*,  
 6 247 F.3d 904 (9th Cir. 2001). Citation to state case law that applies federal  
 7 constitutional principles will also suffice. *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th  
 8 Cir. 2003) (*en banc*). “The mere similarity between a claim of state and federal error is  
 9 insufficient to establish exhaustion. Moreover, general appeals to broad constitutional  
 10 principles, such as due process, equal protection, and the right to a fair trial, are  
 11 insufficient to establish exhaustion.” *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir.  
 12 1999) (citations omitted).

13            After a jury trial in state district court, petitioner was convicted of attempted  
 14 murder with the use of a deadly weapon, discharging a firearm out of a motor vehicle,  
 15 and discharging a firearm at or into a structure, vehicle, aircraft, or watercraft. Ex. 13.<sup>1</sup>  
 16 Petitioner appealed, and the Nevada Supreme Court affirmed. Ex. 17. Petitioner then  
 17 filed in state district court a post-conviction habeas corpus petition. Ex. 23. The state  
 18 district court appointed counsel and held an evidentiary hearing. Ex. 31. The state  
 19 district court denied the petition. Ex. 32. Petitioner appealed, and the Nevada Supreme  
 20 Court affirmed. Ex. 34. Petitioner then commenced this action.

21            Petitioner presents three grounds for relief, and respondents have subdivided the  
 22 grounds. The Court will use respondents’ subdivisions.

23            Respondents first argue that ground 1(a) is not exhausted. Petitioner claims that  
 24 trial counsel provided ineffective assistance because he did not file a pre-trial habeas  
 25 corpus petition or other motion after petitioner’s case was bound over for trial. In his  
 26 state habeas corpus petition, petitioner claimed that counsel should have filed a pre-trial

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 28            <sup>1</sup>Exhibits are attached to respondents’ motion to dismiss (dkt. no. 13).

1 habeas corpus petition or other motion because the victim of the attempted murder did  
 2 not testify at the preliminary hearing. Ex. 23, at 7(b). In his federal petition, petitioner  
 3 argues the same reason, along with some other reasons, why counsel should have filed  
 4 a pre-trial habeas corpus petition. Petition, at 3-3(a) (dkt. no. 5). At the evidentiary  
 5 hearing, trial counsel testified on cross-examination that he did not file a pre-trial motion  
 6 because the chances of prevailing would have been slim, even with the confusing  
 7 testimony at the preliminary hearing. Ex. 31, at 15. On appeal, petitioner argued that  
 8 trial counsel should not have rushed to trial in the hopes of exploiting possibly confusing  
 9 trial testimony. *Bryant v. State*, No. 58232, Fast Track Statement, at 9.<sup>2</sup> The state then  
 10 explicitly argued why trial counsel's decision not to pursue a pre-trial writ was strategic  
 11 and not ineffective assistance. *Id.*, Fast Track Response, at 8-9. The issue was  
 12 presented to the Nevada Supreme Court, and ground 1(a) is exhausted.

13 Respondents next argue that ground 2(b) is unexhausted. In ground 2(b),  
 14 petitioner claims that trial counsel "failed to defend [petitioner] from being convicted of  
 15 Attempt Murder w/ Use of a Deadly Weapon." Petition, at 5 (dkt. no. 5). The Court  
 16 does not agree with petitioner that he raised the same claim in his state habeas corpus  
 17 petition. In the state petition, petitioner claimed that trial counsel "show[ed] no real  
 18 attempt to defend his client from being bound over to District Court." Ex. 23, at 7. The  
 19 claim has changed from counsel failing to defend petitioner at the *preliminary hearing* to  
 20 counsel failing to defend petitioner at *trial*. That change in facts fundamentally alters the  
 21 claim, and ground 2(b) is unexhausted. See *Vasquez v. Hillery*, 474 U.S. 254, 260  
 22 (1986).

23 Respondents next argue that ground 3(c) is unexhausted. The victim of the  
 24 attempted murder did not testify at trial. The prosecution presented a recording of a 911

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 26 <sup>2</sup>Respondents did not submit as exhibits the fast track statement and fast track  
 27 response in petitioner's state habeas corpus appeal. The Court found these documents  
 28 in the on-line docket of the Nevada Supreme Court, <http://caseinfo.nvsupremecourt.us/public/caseView.do?csIID=26381> (last visited  
 February 25, 2013).

1 telephone call, in which the victim spoke for a short time. Petitioner claims that the  
2 prosecution failed to show that the victim actually was unavailable before being allowed  
3 to admit the 911 recording into evidence. Petitioner presented the same claim on direct  
4 appeal. Ex. 15, at 9-10. The Nevada Supreme Court ruled:

5 Second, Bryant contends that the district court abused its discretion by  
6 admitting a 911 call recording containing hearsay statements made by the  
7 victim despite the unavailability of the victim to testify at trial and the  
8 State's limited representations as to why the victim was unavailable.

9 "The Confrontation Clause limits the state's ability to use hearsay as  
10 evidence in criminal trials when the hearsay declarant [is unavailable to]  
11 testify." *Franco v. State*, 109 Nev. 1229, 1239, 866 P.2d 247, 253 (1993).  
12 If the hearsay is testimonial, it is barred by the Confrontation Clause  
13 unless the defendant had a prior opportunity to cross-examine the  
14 declarant. *Crawford v. Washington*, 541 U.S. 36, 68 (2004). If the hearsay  
15 is nontestimonial, it must be excluded unless it falls within a firmly rooted  
16 hearsay exception or possesses particularized guarantees of  
17 trustworthiness. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), *abrogated on*  
18 *other grounds by Crawford*, 541 U.S. at 68-69; see *Gaxiola v. State*, 121  
19 Nev. 638, 646, 119 P.3d 1225, 1231 (2005) (observing that *Crawford* does  
20 not overrule the test in *Roberts* as it applies to nontestimonial hearsay).

21 Here, Bryant has not shown that the statements that the victim made  
22 during the 911 call were testimonial, he has not shown that the exceptions  
23 to the hearsay rule did not apply, and he has not provided the 911 call  
24 recording in the record on appeal. "It is the appellant's responsibility to  
25 provide the materials necessary for this court's review." *Jacobs v. State*,  
26 91 Nev. 155, 158, 532 P.2d 1034, 1036 (1975); see also NRAP 30(b)(3).  
27 Because Bryant has failed to address these threshold issues and provide  
28 us with an adequate record, we decline to reach the issue of the victim's  
unavailability and we conclude that Bryant is not entitled to relief.

Ex. 17, at 3-4. The Court agrees with respondents. Petitioner did not provide the  
Nevada Supreme Court with the record needed for that court to make a decision on the  
issue. In his fast track statement, petitioner did not quote from the transcript of the 911  
call. See Ex. 15, at 8-9. Petitioner presented the claim to the Nevada Supreme Court  
in a procedural context in which that court would not consider the merits of the claim.  
*Castille v. Peoples*, 489 U.S. 346, 351. Ground 3(c) is not exhausted.

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1           Petitioner incorrectly argues that the court can excuse the failure to exhaust  
2 pursuant to *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). In *Martinez*, the Supreme Court  
3 held:

4           Where, under state law, claims of ineffective assistance of trial counsel  
5 must be raised in an initial-review collateral proceeding, a *procedural*  
6 *default* will not bar a federal habeas court from hearing a substantial claim  
of ineffective assistance at trial if, in the initial-review collateral proceeding,

7 132 S. Ct. at 1320 (emphasis added). Procedural default is not the issue now. Rather,  
8 the failure to exhaust is the issue. Procedural default might become an issue if  
9 petitioner returns to the state courts and if the state courts do not consider the  
10 unexhausted grounds for state-law reasons. Then, *Martinez v. Ryan* might apply, but  
11 such a determination now would be premature.

12           The petition (dkt. no. 5) is mixed, containing both claims exhausted in state court  
13 and claims not exhausted in state court, and it is subject to dismissal. See *Rose v.*  
14 *Lundy*, 455 U.S. 509, 521-22 (1982); *Szeto v. Rushen*, 709 F.2d 1340, 1341 (9th Cir.  
15 1983). Petitioner may voluntarily dismiss the unexhausted grounds 2(b) and 3(c) and  
16 proceed with the remaining grounds, he may voluntarily dismiss this action without  
17 prejudice while he returns to state court to exhaust grounds 2(b) and 3(c), or he may  
18 move to stay this action while he returns to state court to exhaust grounds 2(b) and 3(c).  
19 If petitioner chooses the last option, he must show that he has “good cause for his  
20 failure to exhaust, his unexhausted claims are potentially meritorious, and there is no  
21 indication that the petitioner engaged in intentionally dilatory litigation tactics.” *Rhines v.*  
22 *Weber*, 544 U.S. 269, 278 (2005).

23           Petitioner has filed an application to proceed *in forma pauperis* (dkt. no. 10).  
24 This motion is moot because petitioner has paid the filing fee.

25           Petitioner has filed a motion for appointment of counsel (dkt. no. 11). Whenever  
26 the Court determines that the interests of justice so require, counsel may be appointed  
27 to any financially eligible person who is seeking habeas corpus relief. 18 U.S.C.  
28 § 3006A(a)(2)(B). “[T]he district court must evaluate the likelihood of success on the

1 merits as well as the ability of the petitioner to articulate his claims *pro se* in light of the  
2 complexity of the legal issues involved.” *Weygandt v. Look*, 718 F.2d 952 (9th Cir.  
3 1983). There is no constitutional right to counsel in federal habeas proceedings.  
4 *McCleskey v. Zant*, 499 U.S. 467, 495 (1991). The factors to consider are not separate  
5 from the underlying claims, but are intrinsically enmeshed with them. *Weygandt*, 718  
6 F.2d at 954. After reviewing the petition (dkt. no. 5), the Court concludes that  
7 appointment of counsel is not warranted in this case.

8 IT IS THEREFORE ORDERED that respondents’ motion to dismiss (dkt. no. 13)  
9 is GRANTED in part with respect to grounds 2(b) and 3(c).

10 IT IS FURTHER ORDERED that petitioner shall have thirty (30) days from the  
11 date of entry of this order to do one of the following: (1) inform this Court in a sworn  
12 declaration that he wishes to dismiss grounds 2(b) and 3(c) of his petition (dkt. no. 5),  
13 and proceed only on the remaining grounds for relief, (2) inform this Court in a sworn  
14 declaration that he wishes to dismiss his petition (dkt. no. 5) to return to state court to  
15 exhaust his state remedies with respect to the claims set out in grounds 2(b) and 3(c) of  
16 his petition (dkt. no. 5), or (3) move to stay this action while he returns to state court to  
17 exhaust his state remedies with respect to the claims set out in grounds 2(b) and 3(c) of  
18 his petition (dkt. no. 5). Failure to comply will result in the dismissal of this action.

19 IT IS FURTHER ORDERED that if petitioner elects to dismiss the  
20 aforementioned grounds of his petition (dkt. no. 5) and proceed on the remaining  
21 grounds, respondents shall file and serve an answer or other response to the remaining  
22 grounds within forty-five (45) days after petitioner serves his declaration dismissing  
23 those grounds. If respondents file and serve an answer, it shall comply with Rule 5 of  
24 the Rules Governing Section 2254 Cases in the United States District Courts.

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1 IT IS FURTHER ORDERED that if respondents file and serve an answer,  
2 petitioner shall have forty-five (45) days from the date on which the answer is served to  
3 file and serve a reply.

4 DATED THIS 27<sup>th</sup> day of February 2013.

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8 MIRANDA M. DU  
9 UNITED STATES DISTRICT JUDGE  
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